

STATE OF MICHIGAN
COURT OF APPEALS

ATHI NARAYAN, M.D.,

Plaintiff-Appellee,

v

MOUNT CLEMENTS REGIONAL MEDICAL
CENTER,

Defendant-Appellant.

UNPUBLISHED

June 16, 2011

No. 296310

Macomb Circuit Court

LC No. 08-001503-CK

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

TALBOT, J (*dissenting*).

I respectfully dissent from the majority opinion. Although some form of sanction may have been appropriate in this matter, I believe the trial court's failure to following correct procedure precludes our affirmance of the award.

I acknowledge at the outset that the reasons that preclude my ability, in good conscience, from concurring with the majority opinion were not raised or argued by the parties in this appeal. But, in the interest of justice, I believe they are worthy of this Court's consideration and should be addressed.¹

First, I believe the trial court abused its discretion in the grant of a mistrial. "Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice."² "A mistrial should be granted only when the error prejudices one of the parties to the extent that the fundamental goals

¹ "[T]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (citations omitted).

² *Veltman v Detroit Edison Co*, 261 Mich App 685, 688; 683 NW2d 707 (2004), quoting *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999).

of accuracy and fairness are threatened.”³ In this instance, both parties were potentially prejudiced by the erroneous stipulation. While Narayan’s proofs were impacted regarding his asserted damages, Mt. Clemens Regional Medical Center faced the imposition of liability for a wrong it did not actually commit. It would appear that because confusion reigned during the early portions of this trial that the trial court took the easy way out and stopped all proceedings rather than try to discern a reasonable means to salvage what had already occurred and find a way to continue. As recognized by this Court:

Dismissal is a drastic step that should be taken cautiously. Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper.⁴

In this instance, the trial court granted a mistrial on its own initiative and did not explore other options that would permit the litigation to continue. As the focus of this litigation was on the purported damages incurred by Narayan, options short of dismissal were available such as limiting certain proofs or testimony on behalf of the Medical Center or permitting Narayan to expand on his proofs. “[B]ecause the trial court did not evaluate other available options on the record, it abused its discretion in dismissing the case.”⁵

I believe the trial court made a second procedural error in the award of attorney fees and costs immediately after granting the mistrial rather than awaiting the outcome of the second trial. While a trial court is inherently recognized as having the authority to impose attorney fees and costs to sanction a litigant for “egregious misconduct” causing a mistrial, when doing so a trial court is required to “balance the harshness of the sanction against the gravity of the misconduct.”⁶ In addition, it has been historically recognized that “a trial court cannot assess costs immediately following the grant of a mistrial, but must await the final disposition of the case.”⁷ This “rule” has been routinely recognized and adopted in Michigan case law for over 50 years.⁸ I recognize that this rule is premised on the propriety of taxing costs only “to a successful party,” and that “[t]he awarding [of such costs] awaits ultimate disposition of the

³ *Veltman*, 261 Mich App at 690-691, quoting *In re Flury Estate*, 249 Mich App 222, 229; 641 NW2d 863 (2002).

⁴ *Vincencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). See also, *Brenner v Kolk*, 226 Mich App 149, 163; 573 NW2d 65 (1997).

⁵ *Vincencio*, 211 Mich App at 506-507.

⁶ *Persichini*, 238 Mich App at 640-642.

⁷ *Id.* at 641.

⁸ See *Benmark v Steffen*, 374 Mich 155, 165; 132 NW2d 48 (1965); *Fenton Country House, Inc v Auto-Owners Ins Co*, 63 Mich App 445, 450; 234 NW2d 559 (1975); *Carmack v Cichon*, 42 Mich App 233, 235; 201 NW2d 669 (1972).

proceeding.”⁹ While the majority may assert that although the imposition of monetary sanctions was premature it was justified by Narayan ultimately prevailing in the second trial, I would contend it was premature and could not reflect an accurate sanction until the second proceeding was completed. Given the relatively minimal award obtained by Narayan when compared to the amount of costs and fees imposed the sanctions are suspect. In particular, it is difficult to ascertain the relationship between the monetary sanctions imposed that are attributable to the erroneous stipulation.

The ultimate verdict suggests that it would have been unfair to the Medical Center to proceed with the factually erroneous stipulation in place and that any impact realized by vacating that stipulation would not have been unduly restrictive of Narayan’s proofs regarding damages. Further, I would note that there was no indication of bad faith or purposeful misconduct on the part of counsel for the Medical Center in agreeing to the stipulation in order to gain an untoward advantage during trial. Rather, the stipulation was clearly to her client’s detriment. It should also be considered that disputes pertaining to the stipulation arose early in the proceedings on the first day of trial. Had the issue regarding the stipulation been properly resolved when it first arose, it would have precluded the necessity of a mistrial by allowing the parties to change the course or trajectory of their proofs before the jury and could have severely limited the costs incurred by either party from proceeding with the litigation for three days of trial before being dismissed.

In short, I believe the trial court erred in failing to ascertain viable options less severe than a mistrial and by prematurely awarding monetary sanctions before the conclusion of the second proceeding. These failures render the award of attorney fees and costs suspect as any such award must be given the perspective of an actual judgment as there is always a relationship or proportion to be attained between judgments and the amount of sanctions to be imposed. To do otherwise, or as the trial court did herein, was akin to letting the tail wag the dog.

/s/ Michael J. Talbot

⁹ *Id.*